UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
		Docket #15cv8725
UMB BANK N.A.,	:	
Plaintiff,	:	
- against -	:	
SANOFI,	:	
		New York, New York
Defendant.	:	March 28, 2018
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PROCEEDINGS BEFORE
THE HONORABLE ROBERT W. LEHRBURGER,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

For Plaintiff: CAHILL GORDON & REINDEL LLP
BY: CHARLES GILMAN, ESQ.
BRENT ANDRUS, ESQ.
80 Pine Street
New York, New York 10005

For Defendant: WEIL, GOTSHAL & MANGES LLP
BY: JOHN A. NEUWIRTH, ESQ.
STEFANIA VENEZIA, ESQ.
JOSH AMSEL, ESQ.
JESSICA DJILANI, ESQ.
767 Fifth Avenue, 25th Floor
New York, New York 10153

Transcription Service: Carole Ludwig, *Transcription Services*
141 East Third Street #3E
New York, New York 10009
Phone: (212) 420-0771
Fax: (212) 420-6007

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THE CLERK: We're here in the matter for a status conference, UMB Bank N.A. v. Sanofi, 15cv8725. Parties, please state your name for the record.

MR. CHARLES GILMAN: For plaintiff UMB Bank as Trustee Charles Gilman from Cahill Gordon & Reindel.

THE COURT: Good afternoon.

MR. BRENT ANDRUS: Also for plaintiff, Brent Andrus from Cahill.

MR. JOHN NEUWIRTH: Your Honor, good afternoon, John Neuwirth from Weil Gotshal for defendant Sanofi. With me is Stefania Venezia, Josh Amsel, and Jessica Djilani.

THE COURT: Good afternoon. Please be seated. So I have quite a bit in front of me on a long agenda, but I don't actually think it necessarily comes down to this long agenda because, as I see it, many of the discovery disputes that were laid out in the letter sent on March 23 from Mr. Gilman, many of those seem to come within the purview of the motion to compel in regards to the supposedly privileged material.

So I'm happy to try to get to as much of this as we can, maybe everything, unless somebody tells me that it's premature or we shouldn't be addressing a particular issue. And in that group, by the way, you know the summary judgment motion is on here? This was not designated to be

an oral argument on that, but I'm happy to hear from the parties if both parties want to discuss that. I'm prepared to do that. So is there anything that either thinks should not be addressed here among what was set forth in the so-called agenda? Okay, so let's give it a shot. Not promising we'll deal with it all, but we'll try.

I'd actually like to keep the summary judgment motion last though and start with the other stuff and see if we can get that resolved. So on the motion to compel, I'm happy to proceed in any order, but I think I'll just sort of follow the agenda and list of items. So this is about privilege documents and various categories of asserted privilege, and I asked the parties to provide some examples to me, which I've reviewed. Thank you for providing those. And I just want to give you my initial view on the general dispute. This is a case with a lot of documents, as we've discussed. Privilege should not be a tail that wags the dog obviously.

I am not going to review 599 documents or whatever number there are. I will try to give you guidance. But I want to say one thing based on my review of those ten documents, which is, yeah, there may be some portions in there that may not be privileged but I want to hear argument on that or just get some insight, but I'll

tell you, I don't think any of those documents make a hill of beans of difference to this action. I think this is probably a lot of fighting about something that in the end isn't going to make a difference. That's not to say there can't be a document withheld as privilege that would prove important, but I have to say, based on what I've seen, and granted, I'm not tied into the facts like you are, I wouldn't, I try not to make such a big deal of this.

Anyway, that's my initial thought. So there are, the two overall topics that I guess we need to address are whether items are privileged, and then providing logs. And I'm happy to address those in either order. So I believe plaintiff was contesting Sanofi's retention of the documents, or denoting them as privilege, so why don't you let me know what you want me to hear, but keep it short. I mean I understand the position generally.

MR. GILMAN: Sanofi's letter to Your Honor of March 7 forwarding cases, the cases rely on you can share documents with a third party agent. I have here and will be pleased to hand up the engagement letters of a number of these third parties. Every single engagement letter disclaims any agency relationship, disclaims any fiduciary relationship. These are financial advisors, these are communications consultants, these are not parties, expert,

that are being hired to interpret or translate communications between client and lawyer. They have their own job separate and apart from the lawyer to do and their own opinions to render in connection with the transaction. I have the Credit Suisse engagement letter, the Evercore engagement letter, and I'd be pleased to, if you'd like them.

THE COURT: I don't need to right now but I may.

MR. GILMAN: I represent to you that every one of them that we have expressly disclaims agency --

THE COURT: Okay.

MR. GILMAN: You know, for example, Credit Suisse has been retained solely to act as financial advisor with respect to the services described and no fiduciary or agency relationship between the company and Credit Suisse has been created, blah, blah, blah.

THE COURT: Okay, well --

MR. GILMAN: It's the same for the others.

THE COURT: But presumably, my understanding is, aside from the agency rubric there is another basis under which or other bases under which such shared communications could be protected.

MR. GILMAN: Yes, and that's the *Kovel* decision of Judge Friendly back in 1961. The Circuit has discussed

that, we submitted the *Ackert* decision more recently discussing the limitations in the cabining of *Kovel*. It applies traditionally where the lawyer needs a translator to communicate with the client and to obtain information on which then to provide legal advice. The translator is an intermediary that does not waive privilege. That has been expanded in certain circumstances to accountants where some of the accounting jargon is hieroglyphic and you need a translator to facilitate. That's not what we're talking about here, we're talking about financial advisors giving opinions in connection with M and A transactions. They're not being hired by Weil Gotshal. In *Kovel*, the third parties are being hired by the lawyers to assist in giving legal advice. None of these engagement letters are with Weil Gotshal, they're with the client. The client is hiring expert financial advisors to do what financial advisors do directly with the client.

THE COURT: But are there situations though where still there's an inquiry by one of the employees or officers and they want legal advice, they're saying, counsel, I need advice on how to structure this or how this particular document should be worded and I'm seeking that advice by sending this to you as well as our outside firm in this particular matter. And when I say firm, I mean

either the financial firm or whoever else is advising them and then various other employees. Why isn't that protected if it's seeking actually a legal input?

MR. GILMAN: Well, if, in fact, the client is seeking legal advice, and if, in fact, in order for the lawyer to render that advice the lawyer needs to communicate with an information from JP Morgan, or Credit Suisse, or Evercore, or one of the other institutions involved here, I suppose you could make it up. But I don't believe that's what occurred here because these financial advisors weren't being retained to assist the lawyers in giving legal advice, they were being retained separate and apart from Weil Gotshal, separate and apart from any lawyers, and there is no work product claim here.

THE COURT: Right.

MR. GILMAN: There's just no shielding based on litigation and worry in that regard. So we start from the premise that privileges are to be narrowly construed, they're not to be wildly invoked. We received privilege logs that have myriad third parties on them. We asked why. We are left to make motions to compel. We don't know what those documents say. They've been either withheld completely or they have been redacted to the point where we see the addressees, but it is hard to image that a client

would send a document to 20 recipients, a handful of whom are not lawyers, in a disparate group, one communications guy, one investment banking guy, et cetera, et cetera, this is a communication going out to a working group, this is not a communication seeking legal advice, and if it is, it's been waived because you don't send them to working groups.

THE COURT: Okay.

MR. GILMAN: And if you want, we can kind of wrap most of it up, we have received privilege logs for only documents that have been received redacted for privilege. We know that there are documents withheld in full, we know there are documents that are withheld in part, we know that there are documents withheld by third parties, the Weil Gotshal firm hasn't given us a privilege log, they say they will, we don't have one. The Evercores say they will, we don't have one. We have no privilege logs from any nonparty, they just produce whatever they produced and we have no idea what they haven't produced.

THE COURT: Are any of the nonparties represented by counsel other than for Sanofi?

MR. GILMAN: I don't believe, they are all represented by counsel, but not here today.

THE COURT: But not represented by counsel for

Sanofi?

MR. GILMAN: Some may be, but most I would think are not. Evercore has I think Simpson Thacher --

MR. NEUWIRTH: We're not, other than the Weil Gotshal production, Your Honor, we're not representing any of the third parties to which Mr. Gilman referred.

MR. GILMAN: I can't dispute that.

THE COURT: So as for that, you need to take that up with those counsel, if you've got a dispute on here --

MR. GILMAN: Okay.

THE COURT: But not need to get into that today.

MR. GILMAN: We don't have privilege for redactions, we're anticipating getting it, we're entitled to it, but we don't have it. And what seems to have occurred here, Your Honor, and this is the problem, we're not asking for any adjournments under the amended scheduling order. Discovery is supposed to be done the end of the month. Depositions are supposed to be done by the end of June. It is difficult to take an executive's deposition and receive the privilege log afterwards. It's difficult to get a full production in time when they're not even talking about giving us privilege logs for another month or two or more. We have no idea what they're withholding and the volume of what's being withheld under

claims of privilege and the breadth of the claims of privilege. Counsel for Sanofi has stepped up to the plate and they have re-reviewed privilege logs. We have asked them to, pointing out things that we don't think should have come out of the firm in the first place. And to their credit, they have gone back and they've done it again, and they've done it again, but they haven't done it right.

And what we have here is a situation where the breadth of privilege is an umbrella, and that's not what it is. They are cloaking in privilege a transaction where there were multiple participants performing multiple roles, only one of which was as a legal advisor. And the rest of them, it is beyond imagination that you can have this many people copied and some of them are the authors, some of them are the recipients, some of them are ccs, but there is no indication that this is limited to what one would normally think of as the necessary confidential communication for the purposes of requesting or receiving legal advice.

THE COURT: So there are, in acquisitions of this type, they're big, they have working teams, it requires a lot of input from different people and entities, and lawyers are almost always a part of that working group. And I imagine that Cahill has some of its own clients for

which it's done these type of deals and has working groups, are you saying that those communications that Cahill, would have been to or from Cahill in part among those working groups would not be privileged?

MR. GILMAN: Your Honor, there is a big difference between whether something is confidential and whether something is privileged. Working groups can pass around information as they are trying to get from A to B, the closing, and it may well be understood to be confidential. The attorney-client privilege doesn't apply to confidential information, it applies to confidential communications for the purpose of seeking or rendering legal advice. It is no broader than that. And that's not the claims that they're making. They're making, it's a working group, in essence, they all had a common interest, they're all working on the same transaction for the same client, that has never been viewed by courts as attorney-client privilege.

We don't doubt that this information was shared among and between people who respected the confidence of a common enterprise, but that has never been the definition of attorney-client privilege.

THE COURT: No, I agree with you on that, I understand. Let me hear from Mr. Neuwirth about this

generally.

MR. NEUWIRTH: Thank you, Your Honor, and I'll try to be brief. I think the issues are intertwined somewhat, both the motion to compel and the schedule issue, so to speak, so I'll try to address both. Let me start with the motion to compel. And I agree with Your Honor, I think there's a path forward here that's a reasonable one that will work within the schedule of the case.

First of all, it's New York law, not federal law, that governs the Court's determination here as to privilege, because it's a diversity case. There is no dispute about that, I don't think. The cases that plaintiff submitted were all federal law cases, we've submitted cases that determine this issue under New York law. That being said, I don't think there's a lot of distance between the two, if any.

THE COURT: Right.

MR. NEUWIRTH: What is clear from those cases is that the standard is, is the advisor or the consultant facilitating communications between the attorney and the client. I think Your Honor has put your finger on a very important and practical and real world issue. In the context of sophisticated transactions, and this transaction certainly was one, in which our firm was involved, in which

Cahill was involved, in which Your Honor was involved in your prior life before he went onto the bench, certainly there are groups that are working together and assisting attorneys in providing legal advice, and this case is no different, it happened in connection with the underlying transaction, it happened with respect to consultants that were working with lawyers in order to tackle pricing issues, commercialization issues, and other issues. This case is not unique in that regard and it would be quite a ruling, in fact, if all of a sudden in a group like that, where legal advice is being facilitated, there would be no privilege.

But I think the ultimate issue here and this is why I think there's a reasonable path forward, is that what plaintiffs are asking for, at least in the motion, is for a categorical ruling that none of the, call them 450 documents I think we're at now, can possibly be privileged because there's been a per se waiver because there's been a third party involved. There is no case that I've seen that stands for that proposition. In fact, both the cases that plaintiff has submitted to the Court and the cases that we've submitted to the Court, have made that determination as the law requires on a fact document by document basis. And, of course, there are in camera reviews and exemplar is

provided in order to try to make that determination and provide guidance. But it's certainly not a categorical determination and none of the cases stand for that.

THE COURT: No, but the argument here is that based on the list that you've provided, the people involved are ones that, even if a privilege had attached somewhere along the way, it's just too wide and broad and so it's waived, if there even was a privilege. And, therefore --

MR. NEUWIRTH: I understand that's the argument being made, but I think the only way to look at this is on a document by document basis. Obviously, the Court has a very small sample size of ten documents on an otherwise very large log, and these are hard calls. And some situations are going to be privileged and some situations are not going to be privileged, but there can be no categorical waiver and the notion that when you've got investment bankers working with lawyers in connection with trying to execute a transaction that there can't be in privilege. And that's quite a notion and I don't think that's what the law is.

THE COURT: Yes, so what's your path forward that you're suggesting?

MR. NEUWIRTH: Well, look, I think the path forward is, and this will get into the other parts of the

agenda, and, Your Honor, perhaps will give us guidance on the ten documents that we've submitted, we are re-reviewing, as a result of some of our other issues with the plaintiff, every single document on every privilege log that has been produced so far. We've told the Court this morning in a letter that that re-review will be complete by the end of May, which the schedule, by the way, and I think this is a point that's been missed, actually permits, the operative schedule in this case.

THE COURT: And when are depositions taking place and when are they supposed to be finished?

MR. NEUWIRTH: Depositions have already started, four depositions in the case have already happened, under the current schedule they're supposed to be completed by the end of June.

THE COURT: So if you provide -- are you going to provide final logs at the end of May or you've already provided many of those and it's just a matter of the next iteration?

MR. NEUWIRTH: We're going to be done with our privilege logs at the end of May.

THE COURT: So if documents turn up that should have been produced at that point, and depositions have already been taken, I assume you would bring back a witness

to be deposed if the document was one that warranted it?

MR. NEUWIRTH: When you say if documents turn up?

THE COURT: Well let's see on the privilege log, and let's say you were required to produce it because it turned out not to actually be protected, and --

MR. NEUWIRTH: I think we'd have to have, Your Honor, that happens in cases all the time --

THE COURT: Yes, it does.

MR. NEUWIRTH: And we would have to have a discussion as to whether we thought that was appropriate. I understand the plaintiffs may take the position that that is something they want to do and it depends on the situation, we may say yes or we may say let's do a limited deposition, or we may say, no, it's not appropriate.

THE COURT: Right, but I'm just suggesting, based on the time, I agree with plaintiffs that it's a little tight to say all privilege logs are final at this time and now we've only got a month left on depositions. So we just have to leave it at that and you won't have time to get through it and won't be able to ask about documents that are produced. But again, this is not uncommon, none of this is uncommon, it's not uncommon in litigations of this magnitude for a privilege log to be generated by people working very hard and under strenuous circumstances where

it's very hard to make these calls and more document than might otherwise be privileged end up on there. And people do need to go back and review, but it does need to come to an end.

MR. NEUWIRTH: It does --

THE COURT: It does. But on the issue of which ones are or aren't and which parties involved make a difference, when I was looking at the ten documents, there were some documents and some portions of documents where it seemed reasonable to say legal advice was being sought or there were communications about legal advice that really should remain privileged even though it's not a big deal. But there were others where I'm like, come on, this is about a press release, why is that privilege, you're communicating with the PR folks, you're communicating with lots of others, and, yes, we always include, litigators always include lawyers on there, they want to be involved for the reasons they want to be able to able to claim privilege, and maybe if one of the lawyers writes something back that says, well, you should change this, you should change that, here are the legal implications, it might be a different story. But some of these it doesn't look like that's what's happening.

Again, I think it's irrelevant in terms of the

documents at issue, but in terms of privilege it certainly seemed like some were questionable.

MR. NEUWIRTH: Put the relevancy aside, I don't disagree with you.

THE COURT: Okay.

MR. NEUWIRTH: Okay. And that's why I think we have a path forward. I think there are documents for which there are, certainly of the ten there are certainly appropriate claims of privilege and I think there are others which are not. And the good news is, is that we have already committed to once again go through the entire log of everything that's been produced to date and with whatever guidance Your Honor wishes to give us today, apply it to the documents that we still have to log going forward, and we are saying to the Court that we will be done with that project by the end of May which is, regardless of the fact that the schedule is tight and I agree that it's tight, is within the scope of the current operative schedule that the parties negotiated some time ago.

I'm not here asking for an extension of that schedule as well, if we want to let reason prevail, and if Your Honor would be okay with it, I am happy to talk to plaintiff's counsel at the appropriate time, if need be,

and we can move that deposition date out by a month or a month and a half if the Court would be okay with that. We don't have to do it, we can do both on the track that we're currently on. That would be the reasonable thing to do, and the reason that it would be particularly reasonable in this situation, and it can't get lost, is that the amount of discovery, and I don't want to harp on this, but the amount of discovery that's been sought and produced in this case is really quite unprecedented. I mean we're going be at 20 million pages of documents by the end of March. If there's another case in this courthouse that's got that volume of discovery, I'd be somewhat surprised. There are going to be a million documents produced here.

THE COURT: How many are you going to use at trial?

MR. NEUWIRTH: Well how many are they going to use at trial? The issue is, and Your Honor remarked exactly that when we were back here in November, there is no way that anybody could possibly need or use that many documents at trial.

THE COURT: Right, but it can be hard to find the ones that you want to use.

MR. NEUWIRTH: Of course, but, Your Honor, the issue is, they're the master of their case, they decided to

prosecute it the way they wanted to prosecute it, they asked for an enormous amount of discovery, and maybe I should have objected more vigorously then. We worked with them to provide that discovery, we are now at the point where we've produced 20 million or we're going to be at the point where we've produced 20 million pages of documents. Your Honor is right, that is not such an easy task. We all know that in this room. But the good news is, we're essentially still on schedule to complete it.

And with respect to the production of actual documents, we're going to do that by March 30, that deadline is going to be hit. With respect to the privilege logs, that deadline is going to be hit as well. That's why I say there's a path forward.

THE COURT: Okay, so on that big picture view and schedule, I agree, it should remain as is for now. You're grownup people, you'll be able to talk with each other, work out date issues, if there really are documents that come off the privilege log that then become subject to the deposition of someone who is already deposed, there will be good faith discussion about whether that person should be brought back, if there's a good faith dispute I can help get involved. Yes, accommodations can be made for things of that nature. So I actually think, that aside, it just

doesn't need to be, nothing new needs to be done in that regard. And I know there was a request for all this information on logs by April 13th, I think whatever the dates are that currently apply, those are the dates that should rule, subject to the rule of reason, as I just explained about any disputes.

In terms of guidance, you know, part of it also depends on who all these parties are and I only received today, but thank you for providing it, the explanation and identification of who these different entities are. And it's hard to give a general roadmap in general rules and I don't even know that going through the ten documents necessarily helps doing that. In my mind, if a lawyer happens to be on a communication as a cc and legal advice is not being sought from them, and their legal input is not being sought, then it's not privilege in these working groups, I totally agree with that. If the lawyer's advice is being given or asked for directly, then that is likely to be privileged.

I'm less convinced about the waiver argument in that it's a big working group, but again, it depends on the type of communication. You can be having a direct communication with a lawyer saying give me your advice and there are many people cc'd on it because it's important for

them to know, so I'm less concerned about that. But it seemed to me there was in here little of the actual direct stuff, and there were documents where redactions were done and that's fine, as long as it's only those portions with the direct type of communications that are redacted. And I did think there was a document or two where perhaps it should have been redacted because it was wholly withheld and only a small portion of it dealt with what appeared to be a legal issue. But again, I don't know about the relevance of a lot of this quite frankly.

But just let me ask a question on that. I know the biggest, the main dispute is about failure to hit the milestone. To what degree is what happened during development a part of that issue? My sense is it's a fairly sizable part of it, but I'm not clear. And I don't need a long explanation, I just want to understand, is that part of it?

MR. GILMAN: It's fundamentally relevant because the first milestone is the approval of the product.

THE COURT: Right.

MR. GILMAN: The second, third and fourth milestones are sale based following approval. There's another milestone that relates to two different drugs, it's a production based milestone, and, Your Honor, we have

documents among the ones that have been produced that we believe show that Sanofi, upon the closing of the acquisition, which is a week after the CVR agreement is signed up, shortly thereafter cut the budgets for this pharmaceutical drug.

THE COURT: Right.

MR. GILMAN: Cut the budgets, the people that were in charge of the development of this drug, that were in charge of the marketing and sales of this drug, fired off red flares that, you know, the world is over, wow, exclamation point.

THE COURT: Okay, you can stop there, I don't want to get into a long discussion of the merits.

MR. GILMAN: This is fundamentally --

THE COURT: I understand the point, okay, the answer to my question which is, yes, development is clearly important, it's not just about the marketing efforts and the sales efforts, okay. In that case maybe some of the documents are relevant, again, I don't think they make a difference, but maybe they're relevant.

What additional guidance can I give? If you have specific questions, let me know. I always have doubts when marketing, when the communications are really about marketing folks and business strategy and PR. And, look,

when I litigated I always wanted to assert that privilege because it was trying to protect my client but it wasn't always privilege and you've just got to live with that.

MR. GILMAN: The problem we have is Mr. Neuwirth, in his arguments, said that the privilege covers that which facilitates legal advice, it doesn't. The law is crystal clear that if a communication simply proves important to the lawyer, that's not good enough, if it substantially assisted the lawyer, that's not good enough, and the cases are legion. What they have to show is that the third party was necessary so that the lawyer's communications with the client could meaningfully occur. And that's why it began with the translator folks and that's why it's been extended narrowly to professions that require, like accounting in certain instances, although a number of the cases that were submitted by both of us said there's no privilege for Ernst & Young in this particular area, or there is no privilege for Marsh --

THE COURT: Well, right, but it depends on what's happening, it depends on what is going on.

MR. GILMAN: Exactly, but it's not just that it makes it easier, it's not that it facilitates, that's not the standard. You can withhold almost anything under that standard. The standard, we believe, is that in order for

the lawyer effectively to give the advice the client is seeking, the lawyer needs this information, needs it translated, needs it explained, because it's not within the lawyers cannon. It's special. And when you're talking about crafting a press release, you're about as far from special, in terms of legal advice, because they're not claiming work product, they're not claiming that there's an overarching lawsuit that we have to be worried about. We're talking about traditional attorney-client privilege and I think it's being given a pretty broad view.

THE COURT: So if, let me just ask you a couple of hypotheticals. So if a party, let's say Sanofi, has a press release it wants to issue and it runs it by its lawyers to get their input, privileged?

MR. GILMAN: It could be, it could be, but that's not this case.

THE COURT: I understand. So I'm going to build.

MR. GILMAN: Okay. It could well be if the client is asking the lawyer here's a draft that we think, you know, what do you think, does this expose us to X or Y or, sure, it could be.

THE COURT: Okay, and that could have been an internal communication just between the lawyer and someone within the firm, but presumably there's a PR firm involved

or there may be, and so someone from the PR firm is involved, does that remove it from the privilege?

MR. GILMAN: If the PR professional is being asked in his confidence and the lawyer is being asked, but you wouldn't send that to all of your investment bankers and all your PR guys, and all your scientists and all your lawyers on the same email.

THE COURT: No, you wouldn't, but if a deal is big enough, presumably having 10-15 people doesn't mean that's a particularly wide group, there may be 200 people in total working on it, right?

MR. GILMAN: We're not dealing, I don't mean to suggest the number of recipients is the key, it's who they are.

THE COURT: Yep.

MR. GILMAN: You would not send, if you're seeking confidential legal advice on subject A, you might include the lawyer, you might include an expert on subject A, maybe, and you'd have the client, but you wouldn't have four or five other third party professionals, none of whom are agents, none of whom are experts in that, copied on the same document.

THE COURT: But what if each person's expertise is integral to what's going on?

MR. GILMAN: Again, if you can hypothesize something that narrow it would apply to the red-headed stepchild document, it wouldn't apply to 8,000 documents.

THE COURT: Okay. Mr. Neuwirth.

MR. NEUWIRTH: Briefly, Your Honor, first of all, the test, which is the applicable test, is Ozario (phonetic) and it uses the word facilitate directly in the middle of it. It says, "similarly, communications made to counsel through a hired interpreter, or one serving as an agent of either attorney or client, to facilitate" --

MR. GILMAN: Agent.

MR. NEUWIRTH: "An agent of attorney or client" --

THE COURT: All right, one person.

MR. NEUWIRTH: "To facilitate," we love the give and take, "to facilitate communication generally will be privileged," that's Ozario.

MR. GILMAN: Made to an agent to facilitate --

THE COURT: Hey, hey --

MR. NEUWIRTH: These are disclaim agency of the attorney or client, and, by the way, it goes on to say, "the scope of the privilege is not defined by the third party's employment or function," the issue that plaintiff's counsel is raising; however, it depends on whether the

client had a reasonable expectation of confidentiality under the circumstances. I don't want to spend a lot of time --

THE COURT: Well confidentiality when there's a communication with a lawyer involved.

MR. NEUWIRTH: Correct.

THE COURT: Again, I agree with plaintiff's counsel that it's not just if it's confidential.

MR. NEUWIRTH: Correct, I agree with that, as well. I don't want to spend a lot of time, Your Honor, arguing about that. I think we understand what the Court has said. I understand Mr. Gilman's view, I think Mr. Gilman will be pleasantly surprised that a lot of documents are going to come off of this log before May 31 or by May 31, but we certainly understand. I disagree fundamentally with the notion that in sophisticated companies and sophisticated transactions, working groups aren't large and legal advice isn't sought and received in the context of working groups, it happens every single day of my practice and I can tell you, and I'm sure Your Honor knows this, and I think Mr. Gilman knows it, as well, that clients expect the privilege to attach in those situations and for those documents to remain privileged. It has to be done on a case by case basis and a document by document basis, it's not

always going to be the case, but it certainly is going to be the case sometimes, particularly with financial advisors.

THE COURT: Right, but again, I think it comes back to the communication and what it is seeking or getting response to. And in the documents that were here, the ones that you submitted, again, there are some that just seem fundamentally about a non, it's really not seeking legal advice, it's just input on a business decision, be it a press release, be it a particular part of the acquisition, whatever it is. And lawyers certainly have to know about certain things that are happening so they can go do what they need to do, but I don't know that that makes the communication privileged. And I think you've really got to take a careful look at the documents on your logs about is this really about a legal matter or is it really just this is a business decision that's going forward and the lawyer's participation here, it's really about a business function that's going on. And you should consider also whether the group is so wide that you really can't claim its privileged. There are times when that happens and sometimes a lawyer is just cc'd to make it look like it's privileged when we all know it's really not. So those are words of wisdom I can give to you.

MR. NEUWIRTH: Understood.

THE COURT: Okay, all right, anything else on the privilege issues that we should discuss? It seemed to me there were a couple of issues and let me just see if I can hit them. So besides privilege log, so is there an issue about French in house counsel and whether documents, whether documents involving French in house counsel not admitted to any American bar are privileged or not?

MR. GILMAN: May I have Mr. Andrus --

THE COURT: Absolutely.

MR. GILMAN: He's earned the right to speak --

THE COURT: I would think so.

MR. GILMAN: And we're pleased that you are going to have the opportunity.

THE COURT: I am pleased, as well.

MR. ANDRUS: There is an issue, Your Honor.

THE COURT: Okay.

MR. ANDRUS: With French in house counsel. As defendant has said, they have agreed to re-review all of these privilege assertions, so now on that issue we're just at a date.

THE COURT: Okay, so you're just waiting then -- but why does it make a difference, why does it make a difference if someone is not admitted in the US? If

someone is seeking counsel from a lawyer, I don't care where they are, do I?

MR. NEUWIRTH: Hey, Your Honor, we're with you, but the case law is not as clear as you and I would think it should be.

THE COURT: Okay.

MR. NEUWIRTH: And that's the issue. What we've committed to do, Mr. Andrus is absolutely right, is we are, in the context of completing our logs by the end of May, going back, and to the extent we think that law is wrong, respectfully --

THE COURT: Okay.

MR. NEUWIRTH: But to the extent that we've got solely French in house folks on documents, we are going to take those off the log. To the extent there's another basis for privilege, for instance, there's a US barred lawyer there and there's an appropriate claim of privilege, we will not be taking them off the log. But to the extent we've got solely French folks who are not barred, as a result of that case law, which I think is subject to debate, by the way, we have determined that we're going to give them those documents.

THE COURT: Okay. Does France have a privilege that would apply, and, if so, could it be invoked?

MR. ANDRUS: That's the issue is that France does not and so if they do not have an American admitted attorney, then New York law is that those are not properly withheld documents.

THE COURT: Okay, all right, but I hear agreement on going forward to try to resolve this so that's terrific. Yeah, was there?

MR. NEUWIRTH: We'll move on to the next one.

THE COURT: Okay. Proof of contemporaneous bar membership for all individuals designated as attorneys. Well I understand that, are they lawyers or are they not, how far does this go?

MR. ANDRUS: That's our request, we just want a list of the attorneys and their, because this is an issue, looking at the French in house counsel, as an example, the US bar membership is necessary for privilege assertion.

THE COURT: Okay.

MR. ANDRUS: So we're just asking for a list of the attorneys that they are seeking their documents to be --

THE COURT: And you're asking for when they were admitted to the bar it looks like?

MR. ANDRUS: Just the contemporaneous with the communication --

THE COURT: Oh, okay.

MR. ANDRUS: Oh, what bar they were admitted to.

THE COURT: Is that something you are going to provide, any objection?

MR. NEUWIRTH: We do have an objection, Your Honor, but I'm not sure it's a big issue. It's based on a flawed premise and I think the argument that we received was 11 of 16 attorneys were misidentified as non-attorneys, I mean as attorneys when, in fact, they weren't. They are, in fact, attorneys, they just happen to be French attorneys. So 14 of the 16 are, in fact, attorneys, I think the issue comes back to the one we were just discussing which is to the extent that we've got documents that only involve French in house counsel, to which the privilege arguably does not attach, we're going to produce those documents. But we think it's completely unnecessary for us --

THE COURT: But you said 14 of 16, what were the other 2?

MR. NEUWIRTH: Well, one was mistaken --

THE COURT: Okay, that happens.

MR. NEUWIRTH: Of the 16, and the other was an attorney. So 15 of 16 we had right, the issue comes back to this issue of are they French in house counsel without an

American bar license or not. And that issue I think has been resolved because we've committed to go back and actually produce documents that involve French --

THE COURT: All right, so Mr. Andrus, why is anything else necessary.

MR. NEUWIRTH: But that we have to produce another piece of paper to list peoples' bar licenses and dates, given what we are doing already --

THE COURT: I got it.

MR. NEUWIRTH: Strikes us as a bit much.

THE COURT: Okay.

MR. ANDRUS: We're not asking for a lot. It's a list of names of the attorneys. They've already identified that they're withholding their documents based on privilege, we're just looking for the state that they're admitted, because it's already been an issue and because we are entitled to the information that is necessary to evaluate their privilege claims.

THE COURT: Okay. Here's what you should do, if there is anyone who is not an attorney that you've previously identified as an attorney, take them off the list, right, and it looks like you've already done a lot of that. And you are going to be producing the French lawyer stuff, it looks like, so that's going to go away. I don't

think you need to put together a whole list of contemporaneous bar membership, I think that goes a little far. So I'm not going to require that.

Non-Sanofi employer email accounts, what's that issue?

MR. ANDRUS: So there are board members who had communications with attorneys and they're being withheld for privilege. But the email account that those board members used was their employer account, employer email for their full time employer. So we give the example, United Healthcare, someone who worked for United Healthcare is on the board of Genzyme. They communicate with Genzyme people, they're attorneys, those communications are withheld for privilege, but that email account, that United Healthcare email account, they don't have an expectation of privacy on that account --

THE COURT: Why not?

MR. ANDRUS: As it relates to the Sanofi or Genzyme privilege assertion.

THE COURT: Why not?

MR. ANDRUS: Because United Healthcare has the right to look at that email account any time United Healthcare wants to. And we've cited two cases that have addressed this exact issue.

THE COURT: Do the directors have an email for the company for which they are director?

MR. ANDRUS: I wouldn't know that.

THE COURT: Do they?

MR. NEUWIRTH: Well I think it's case specific, this is a general issue that plaintiff has raised that in situations where you've got a board member of Genzyme or Sanofi board member that is employed by another corporation, Your Honor, and United Healthcare is the example that's been given, to the extent something was sent to the United Healthcare email address, that there can be no claim of privilege over that because there can be no expectation of privacy. Your question, I believe, was do board members in that situation have a Genzyme or a Sanofi email account --

THE COURT: Do they have an alternative email they could use where there would be an expectation of privacy? They have personal email, presumably, but do they have a separate email as director that's for the company for which they are director?

MR. NEUWIRTH: I think it's case specific, I don't know if I can answer it in detail, Ms. Venezia, I don't know if you can, but I think we'd have to look into it on a person by person basis. I'm not prepared to concede

in any way, shape or form that there wasn't an expectation of privacy in this example when the person was using their United Healthcare email address.

THE COURT: Well I would agree with you to the extent that I'm sure everyone who sent an email believed it would be kept private. Whether that is allowed as a matter of law is a different question.

MR. NEUWIRTH: Well that's the issue, it's not as simple as Your Honor saying there is no expectation of privacy, and, therefore, none of these documents can be privileged. There is actually a test that applies, it's a four part test, the case is *Asia Global Crossing*, and it's four parts: Does the corporation maintain a policy banning personal or other objectionable use; does the company monitor the use of the employee's computer or email; do third parties have a right of access to the computer or emails; and, four, did the corporation notify the employee or was the employee aware of the use and monitoring policies.

THE COURT: Right, and whose burden to prove those points?

MR. NEUWIRTH: Well I think that's the issue, Your Honor, is whose burden it is. It's our burden to establish that a privilege applies, I think that's pretty

clear in the privilege law. And so where does that leave us, you know, I'm not sure exactly what the request is. Again, this was something that was raised on Friday. I will tell you this, again, I'm not sure how big of an issue this is at the end of the day, we are obviously going through all the privilege logs, certain things are going to come off, I don't know how much, if any, of this stuff is going to remain. I guess the question is what's the path forward. With respect to those that do remain, do we need provide evidence as to why there was an expectation of privacy and confidentiality with respect to those, perhaps we do.

THE COURT: I think it's an unnecessary expenditure of time and effort, and I would just say given what we're dealing with here, the extent of which there are such emails compared to everything else that there is and the amount of work that's been required, is neither proportional nor appropriate to -- to say that those are waived in this context or to make, have you go through the trouble of having to prove whether or not those four elements are met for any corporation that someone was an employee of but was using it to send an email in their capacity as director. So I am not going to require that, I would deny a motion to compel on that basically. If there is some other basis or you come across some evidence that

really suggests that there was a reason to not expect privacy and the plaintiff can show what the policy is of the corporation and whether the other elements are met, I might reconsider, but otherwise I think it's a waste of time.

Okay, let's see. Now attorney on the communication, that's self evident. Withholding of attachments, and, yeah, so I did have a question for Mr. Neuwirth on that because it wasn't clear to what extent that was happening. And were attachments withheld in situations where the cover email was privileged or something on the cover was privileged but the attachment by itself was not?

MR. NEUWIRTH: Not intentionally, Your Honor. And what we're doing, again, not to beat a dead horse as part of the re-review, is insuring that any attachments that were withheld were, in fact appropriately privileged and if they're not they will be produced. But there is certainly no intent to simply withhold attachments. We understand that if an attachment doesn't have an independent basis for privilege it's got to be produced.

THE COURT: I would encourage you to produce any attachments of this nature with a, if the front document is to be redacted, with that document in redacted form. So

there's a date, there's a re line, et cetera, so there's a context for the attachment. And you should also identify which Bates number it goes with or maybe the front document will have the Bates number and you can just attach it to that.

Okay, 3,000 improper redactions, but you've agreed to re-review so I think that's a nonissue for the moment, correct? Yes?

MR. ANDRUS: Agreed.

THE COURT: Okay.

MR. ANDRUS: Just to raise one point on the timing?

THE COURT: Yes.

MR. ANDRUS: They have asked for a May 31 deadline for everything.

THE COURT: Right.

MR. ANDRUS: All we're asking for here is an interim deadline for the re-review for the things that should have been done right already, that are already logged, already produced, so that we don't have a backlog at the very end where we have to review everything at once, including the stuff that hasn't been logged, hasn't been produced, hasn't been redacted yet.

THE COURT: Seems like a reasonable request when

he puts it that way, what do you say?

MR. NEUWIRTH: Very nice. Your Honor, what it is, is a request to revise the schedule. We've got a schedule and I think, while it sounds nice, we can never forget in this case just what the job has been and the job is really at some level unprecedented, the amount of documents that we've had to produce. And so while I appreciate that plaintiffs initially wanted millions and millions of pages of documents but now would like things to be done a little bit quicker, I don't think that's a reasonable ask.

THE COURT: Well it's slightly different than that, it's material you have already provided and it wasn't correct. So they're just saying can you take care of this so that we don't further put off things that should have been done right previously. And I think, so the question is really, you know, can this be done. What an be done.

MR. NEUWIRTH: I'm thinking maybe, Ms. Venezia, you should speak to it, but I think the way that we are doing this re-review requires us to go through this and part of the way to get it right is obviously to shrink the size of the team that's doing it so there's consistency across the re-review, and do it in an across the board order. And so when we say May 31, it's because we want it

to be done and be done correctly. And I think everybody will be pleased to see a lot of documents come off the log as a result of that, but I don't believe it's doable by April 13, and you can speak to it in more detail.

THE COURT: Wait, what can you do in terms of a rolling basis, like providing periodic productions of anything that comes off the list?

MS. VENEZIA: I think, Your Honor, providing a rolling production of the privilege documents as de-designate them, I don't think will resolve the issue and may perpetuate some of the issues that have been ongoing, as Mr. Neuwirth said, we want to make sure we're doing this one last time and we do it right, and we do it consistently. And I do think that taking the time to make sure we get to that place so that we don't have to, you know, have these conversations with plaintiff when we produce logs on May 31 is the most efficient way to get this done and be done with it and get it done right.

THE COURT: I mean I can see the issue of you say a document has gone off on a rolling production and then you come across something later that gives more context that might lead -- might lead to a different conclusion. But at the same time, I don't know that waiting to the end really makes sense.

How about if, well when are you starting the re-review, is it underway right now?

MR. NEUWIRTH: Yes.

MS. VENEZIA: Yes.

THE COURT: Okay. So how about we just say, well, it presents the same problem. How about we say any time you come across a document that you're sure is not privileged, because I'm sure for some of them it's just going to be obvious, and there's some categories you've already said, oh, you know, French counsel, we'll look at the document, but it can go, whatever it is that you might be able to do categorically, just produce what you have at the end of the week. If there are documents you have a close call on and you need to see others down the line, that's fine, but if there are some that are just, you know, it's pretty straightforward, I would just say produce it. And if you, just don't hold them all until the end is sort of my concern.

MS. VENEZIA: Well we will try to find a way to make that work. What I will say, Your Honor, is that there will not be, we will not be able to produce revised logs, revised final logs at the time that time that we produce those documents --

THE COURT: No, I understand, you're just

producing the documents. Anything else, Mr. Andrus, on that?

MR. ANDRUS: Just a couple of points, and you've been very reasonable.

THE COURT: Sure.

MR. ANDRUS: The first point is that one of the counts, all of those documents should have already been produced in the fall. That deadline is over, those should be done.

THE COURT: Right, but this is a privilege log issue, but I understand the concern.

MR. ANDRUS: So there is no need to wait around and see what other documents come out of it because that's a set. In the scheduling order, we already asked for a rolling privilege log for this very purpose, so that we would not get back loaded.

THE COURT: Well we're back loaded here because it wasn't done correctly.

MR. ANDRUS: It wasn't done right. And it should not be our burden to force the other side to do it right.

THE COURT: That's true.

MR. ANDRUS: Right. To go through the expense of reviewing all these, finding the errors, going through the meet and confer, coming to court, and so that is our

request, that we push a little bit.

THE COURT: Your points are well taken, I'm going to leave it as is, but your points are well taken.

All right, the next thing on here is spoliation, and there certainly isn't enough information to act here if there really is a claim of spoliation. But just tell me what's going on.

MR. ANDRUS: The request is for information. We have asking for information behind the deletion of the documents, they have resisted, they have denied those requests, that's the request.

THE COURT: Right, okay.

MR. NEUWIRTH: Well, we've resisted for a good reason, Your Honor, the gentlemen who left, left in 2011, which was five, six years before this claim was filed. And so the notion that there's a spoliation issue that we need to explain in that circumstance, we just think doesn't hold up. A) there was no requirement, obviously, to protect documents five years before a litigation was even on the horizon, and even if you had other ongoing litigations or investigations going on, they weren't substantially related and this plaintiff has no standing to raise that issue now. So that's why we haven't provided the information.

On top of that, Your Honor, many of these

documents are being provided by virtue of hard drives, and servers and other things, so we just don't think there's an issue there. Certainly not one that required us to preserve somebody's documents six years before a litigation was even on the horizon, and it doesn't give this plaintiff the right to walk into court with any standing and complain about that issue.

THE COURT: And just before we go there, you said that he left five or six years before, before what?

MR. NEUWIRTH: He left in 2011.

MS. VENEZIA: Mr. Knute (phonetic) left in the middle of 2011 and the three other individuals that plaintiff has referenced, not by name, but just by number, left in 2010 and 2012.

THE COURT: Okay, and you're saying that was five or six years before the litigation was initiated?

MS. VENEZIA: Plaintiff has indicated that these individuals are relevant for purposes of the production milestone claim which was not filed until 2017, Your Honor.

THE COURT: Okay, but when was the agreement entered for the CVRs and everything that went along with it?

MR. NEUWIRTH: 2011.

MR. ANDRUS: April 2011.

THE COURT: Okay, so there's contemporaneous things going on around the time, I, hold on, I'm just saying in terms of the potential relevancy, but I do want to hear from Mr. Andurs on why there was possibly an anticipation of litigation at this time that would have imposed a duty to preserve any time around that?

MR. ANDRUS: Our contention is there was other litigations around this exact subject matter, starting then and going on until the present.

THE COURT: What other litigations?

MR. ANDRUS: There was a securities litigation about CVR disclosures. There was ongoing FDA disputes about the two drugs at issue in the production milestone claim. We have more of them that I don't have right in front of me, but that is our belief is that there were continuous litigations that would have dictated these documents be preserved. And all we're, we're not even saying that there was spoliation at this point, we're asking for information about the deletion of materials.

THE COURT: And what is it about these other litigations that make you believe those documents should have been kept, do you have access to document requests, other materials that would suggest that they should have been?

MR. ANDRUS: Complaints and subject matters, that they covered the same subject matter is at issue here.

THE COURT: What is the subject matter, when you say the subject matter, what would that be?

MR. ANDRUS: Both the CVR agreement, itself, and the milestones, and the drugs, there's two drugs at issue in the production milestone claim, there were ongoing disputes with the FDA about the quality, the facility that made those drugs. And so there was litigation about that.

THE COURT: Were there any allegations in any of this litigations that there had been spoliation of Mr., is it Kaput?

MR. NEUWIRTH: Knute.

THE COURT: Knute's email?

MR. ANDRUS: We don't have access to that level of discovery detail --

THE COURT: Okay. All right, Mr. Neuwirth.

MR. NEUWIRTH: First of all, Your Honor, the securities litigation wasn't filed until well after Mr. Knute and the three other individuals left the company. I defended that litigation, it was a couple of years ago. That's the first part.

The other litigations to which Mr. Andrus refers were not about the CVR agreement. Maybe more importantly,

in addition to the matters that I raised before I sat down, this is certainly not properly presented to this Court. This was an issue that was added to the agenda on March 23, Friday, if they want to make a motion for spoliation, I've previewed our position it, they're free to do it --

THE COURT: Well, they want discovery on spoliation.

MR. NEUWIRTH: Well, again, the reasons why we don't think that they're entitled to discovery on spoliation are the ones that I've given you.

THE COURT: Yes --

MR. NEUWIRTH: This litigation was nowhere on the horizon, nowhere reasonably anticipated, and had nothing to do with the litigations that were the other litigations to which they referred.

THE COURT: And it's just a sideshow for what is an endless amount, as you have noted, of documents and litigation. I don't see any reason to grant this. If there comes further evidence that you have where you believe there's been spoliation, you can present it, but going into discovery on that issue for this is just not merited. Mr., I'm going to hear some disagreement I think.

MR. GILMAN: Only that spoliation, perhaps that's a word that causes people to think of willfulness --

THE COURT: It can be negligent.

MR. GILMAN: Of intentional destruction. It can be negligent, it can be whatever. What we're talking about here is the gentlemen and his team who were hired to fix the production problems in the plant, there were two drugs that were already approved that were hundreds of millions of dollars a year in sales and they were stopped because of contamination in the facility in Massachusetts. The production milestone dealt with we have to fix the facility, get it back online, get it approved, QC, back online, and as soon as we produce certain levels, not sell them, but as soon as we produce certain levels of these two existing drugs, the CVR gets triggered, $400 million at issue.

THE COURT: Right.

MR. GILMAN: The people we're talking about are the people that were hired to fix the problem and months, just months after Sanofi becomes their boss, Mr. Knute is gone. The other one leaves a little bit later. All we're asking is when were their files deleted, their electronic files, when were they purged, who purged them, and on what basis. Now we can serve a 30(B)(6) notice and be back here in two weeks because he refuses to produce a witness, but that's all we're asking for. We're not asking for rulings

from the Court about inferences at trial, that's down the road.

THE COURT: In general, have 30(B)(6) depositions occurred at all at this point, I assume not?

MR. GILMAN: There's been one. One on a limited subject, but --

THE COURT: Anything about documents and retention policies or anything like that?

MR. NEUWIRTH: It was a negotiated subject and did not cover this at all, if I may, Your Honor --

THE COURT: Yes, sure.

MR. NEUWIRTH: It was on the production milestone and it certainly could have been a topic, it was, the plaintiffs gave us a list of topics and we produced the witnesses.

THE COURT: I'm sorry, I meant specifically about retention and document systems and things like that.

MR. NEUWIRTH: That was not covered during the deposition, it presumably could have, this was not a new issue.

MR. GILMAN: It wasn't part of the negotiation. The 30(B)(6) was a carefully negotiated, very odd deposition. It dealt with what are your scientific capabilities in a certain area and it was hopefully limited

to that.

THE COURT: Is there a limit in place on the number of depositions, there must be.

MR. GILMAN: Twenty-five, and we don't think, if we're going to have to be running around the barn on this one and we can't get a straight answer as to when were they deleted, and who deleted them, and by what reason were they deleted, this is key guys, we don't want these depositions to count against the number.

THE COURT: Well here's what I'll do, two hours, 30(B)(6), if there's something there you get your two hours back, if there's not, you've sacrificed two hours of one seven-hour deposition, that's what I'm going to do. Okay, there we are.

I see on here dates for Sanofi fact witnesses but I assume that's something you guys can work out. Am I wrong?

MR. ANDRUS: That's not in our court.

THE COURT: Okay. I had seen here something about dates for Sanofi fact witnesses, but I was assuming that that's something that you guys are going to work out. But is there a dispute there?

MR. NEUWIRTH: I don't think so, Your Honor, I think, obviously, there were some timing issues that were

at issue today on privilege issues and otherwise, they've asked for depositions dates, we've begun to provide them, there have been four depositions already. We will continue to provide them shortly.

MR. GILMAN: Your Honor, February 23 we noticed, I don't know, a dozen depositions and we proposed dates, and we said talk to us about, you know, availabilities and whatnot. It has now been a month and five days, we have dates for two people. It's not that easy to get information. This is basic stuff.

THE COURT: When are the depositions being set for, the two that you've already got?

MR. GILMAN: Well we set them for March 13 through May 17. Now the early dates have already come and gone without witnesses.

THE COURT: Well, right, and there is still some document production taking place, obviously.

MR. ANDRUS: The two that we have scheduled are May 3 and May 9.

THE COURT: Okay.

MR. NEUWIRTH: And by the way, we haven't spoken to plaintiff's counsel about this, but I don't want it to go unremarked upon, one of those dates may need to move slightly, but within May.

THE COURT: Okay. So what about the rest?

MR. NEUWIRTH: We obviously have recognized that there's more document work to do. We're happy to proceed with depositions and we'll provide them with dates very shortly after this conference for some people, not all yet. But if they want to proceed in the near term with depositions, we're perfectly happy to do that, and they will get the dates, I don't think there's an issue there.

THE COURT: How long will it take you to get the dates to give them?

MR. NEUWIRTH: Well we don't have dates for all but I think we've got dates for some that we'd be prepared to give them as early as tomorrow.

THE COURT: Okay, how many?

MR. NEUWIRTH: Two, I believe.

THE COURT: That's not very many. That's a start --

MR. NEUWIRTH: It's a start.

THE COURT: So when are you going to get the rest?

MR. NEUWIRTH: We've given them two, that's four off of the list, we're not intentionally trying to delay it, Your Honor, I think we will be able to do it in relatively short order.

THE COURT: So when can, let's get something somewhat structured in there so that it's not just left hanging.

MR. NEUWIRTH: I mean, again, I don't have my client in the room, and so it's a little tricky, it's a big corporation, there are some very senior people on this list.

THE COURT: I'm sure.

MR. NEUWIRTH: With busy schedules. And so to commit to a date is hard. We will endeavor to get them as many dates as possible within the next two weeks.

MR. ANDRUS: The other issue --

MR. NEUWIRTH: Your Honor, they asked for these dates on February 23 --

THE COURT: I understand.

MR. NEUWIRTH: A month is not a terrible amount of time in the context of this case.

THE COURT: I agree.

MR. ANDRUS: The other issue is that we noticed dates starting in March, two of those dates have already passed. We noticed dates in April, I don't think we're going to get any depositions in April. Our first date is May 3, we have one May 9, we're running up against our June 30 deadline.

THE COURT: Yes, you are.

MR. ANDRUS: We have 14 that we've noticed, we have 6 more that we have still yet to notice, we need to examine documents. We've got to fit all of these people before June 30, we don't want to delay this case. That's the issue.

MR. NEUWIRTH: That's an interesting statement when they've received 20 million documents. And we just cannot lose it because this is a unique situation. And so while I appreciate that now you don't want to delay the case, unfortunately, the volume here is basically unprecedented and, you know what, if we want to let reason prevail, perhaps we might have to slip past June 29 a little bit.

THE COURT: Yes, so Mr. Neuwirth, calm down a little, no need to address your adversary. Yeah, it's a lot of documents and that happens in many cases actually. And whether it's unprecedented or not in terms of the actual number, I don't know. It does seem to me that there is an unrealistic timeframe here at the moment, and I never want to see dates slip if they don't have to. But it does seem there might need, we might need a little grease in the wheels.

Did I set the last schedule or did the DJ?

MR. NEUWIRTH: You did, Your Honor.

THE COURT: I did, okay.

MR. ANDRUS: And we're not asking for it to be moved right now, we will work with them to schedule as many depositions as we can, and if they want to double track depositions, we can try to do that. Alternatively, we'll work on something that's reasonable, but we're not trying to delay. We're trying to finish our document production, finish the privilege log, and move into the bulk of the depositions.

THE COURT: All right, so get them the two you know of, get those dates to them tomorrow, work hard and in good faith, diligently, to get dates for the rest of your people, and let your client know that the judge wants that to happen promptly.

MR. NEUWIRTH: Will do.

THE COURT: Okay. All right, is there anything else other than the summary judgment issue that we need to address? Going once, going twice, gone, okay. So I haven't read it recently, I read it a couple of weeks ago, but it seems to me that this is a very narrow issue, that the plaintiff wants to enforce a contractual right, and what is, and I understand that in the context, if you want to seek TRO or PI there are other issues that may prevent

such relief from getting granted, but right now we're seeking a declaratory judgment and a grant of summary judgment on that. That they have the right to inspect the books, get certain information, et cetera. Why shouldn't that happen, Mr. Neuwirth?

MR. NEUWIRTH: Sure, Your Honor, two reasons, and it requires a little bit of history, but let me give you the two reasons. One, there is a genuine issue of fact that precludes the grant of summary judgment that plaintiff, itself, has injected into this claim.

THE COURT: Counterclaim of bad faith?

MR. NEUWIRTH: No, I'm going to get to that.

THE COURT: Okay.

MR. NEUWIRTH: The genuine issue of fact is this, 7.6(A) of the CVR agreement does contain an audit right, but all that audit right allows is for the auditor, the independent auditor to check the numbers. Plaintiffs concede that in their papers. Plaintiffs have asked for, the CVR agreement 7.6(A) also allows for the auditor to declare a CVR shortfall in the event a milestone should have been paid but wasn't paid.

THE COURT: Right.

MR. NEUWIRTH: There is a dispute among the parties, there wasn't always, but there is now because

plaintiff has turned it into one, about what the appropriate measuring period is for product sales milestone number one. There was initially, at an earlier stage of this case, agreement that that measuring period ended on June 30, 2016.

THE COURT: Right. No, I recall that that's become an issue and there could be a six month slippage period.

MR. NEUWIRTH: Plaintiffs think now that it could be as late as December, Your Honor is absolutely correct, December of 2016. That's an issue of fact.

THE COURT: Okay, but that goes to the issue of whether the auditor declares a shortfall as opposed to whether the auditor just checks the numbers. And why can't that happen?

MR. NEUWIRTH: Well, because they're asking for both.

THE COURT: Well I know.

MR. NEUWIRTH: They're asking for the auditor to not only check the numbers, but for the auditor to check the shortfall.

THE COURT: Right. Can those be separated?

MR. NEUWIRTH: They could be separated, but the question is, does it make any sense to separate them?

THE COURT: Why doesn't it?

MR. NEUWIRTH: It doesn't, because plaintiffs say it would be more efficient, we don't think it would be more efficient at all. They're seeking to audit a larger period, from 2013 all the way to the end of 2016, and they're seeking to audit the exact same issues and underlying information that's at issue in this litigation. And so under those circumstances, we just don't think it makes any sense to enable that audit to occur. Certainly -- go ahead.

THE COURT: If he calculates the numbers though, and does it for an extra six month or year period, A) why is that a big deal, and B) how much work does it require after compiling the numbers to actually determine whether there's a shortfall?

MR. NEUWIRTH: Well, assuming you've got agreement on a measuring period, which we don't, that's an issue that is going to be litigated in this case. The auditor cannot do that.

THE COURT: So what's the beginning, what's the, give me the extremes, what are we looking at, the earliest and the latest, the measuring period?

MR. NEUWIRTH: Well I think the latest, well, the earliest is the period that we're saying it is, which is June 30, 2016.

THE COURT: Okay.

MR. NEUWIRTH: And the latest is end of December, 2016, and the beginning period that I believe they want to audit is January 1, 2013?

MS. VENEZIA: End of '13.

MR. NEUWIRTH: End of '13. End of '13 through the end of '16, so a three year period.

THE COURT: But, wait, wait, wait, I'm sorry, where is, what's the disputed period, not in terms of auditing, just in terms of where the dispute in the, you know, there's a six month or one year slippage. I'm trying to figure out what's the earlier of those between you two, and what's the latest? So one of you is going to have the earliest, and the other is going to have the latest.

MR. NEUWIRTH: Let me see if I'm understanding that and can answer it.

THE COURT: Just two dates is what I'm looking for.

MR. NEUWIRTH: Well are you asking --

THE COURT: Who among you says the period starts earlier?

MR. NEUWIRTH: They do.

THE COURT: They do. What's the beginning of your period that you contend should be the starting period?

MS. VENEZIA: So, Your Honor, our measuring period is triggered off of the product launch date and the CVR agreement which under our view was in April of 2014.

THE COURT: Okay.

MS. VENEZIA: Which runs our measuring period through June 30, 2016.

THE COURT: I'm sorry, it begins on June 30, 2016?

MS. VENEZIA: Ends, Your Honor.

THE COURT: Ends, when does it begin? It begins in April of 2014?

MS. VENEZIA: 2014, I'm going to confirm that, yes.

THE COURT: Okay, and Mr. Andurs, what's your period? What's the period that you contend is an alternative period?

MR. ANDRUS: That is still an issue that we're in discovery on.

THE COURT: What is the --

MR. ANDRUS: It could be as late as a year later.

THE COURT: Could it be any more than that?

MR. ANDRUS: No, that's open but we don't think so. If I might clarify but go ahead if you want to keep going.

THE COURT: No, no, go ahead.

MR. ANDRUS: The audit is meant to cover product sales statements. The product sales statements give the sales --

THE COURT: You know what, Mr. Neuwirth was in the middle, I don't want to take away --

MR. ANDRUS: Yep, let him go.

THE COURT: Keep that thought, let me know, but let me let Mr. Neuwirth finish.

MR. NEUWIRTH: So I think that's really the first issue, Your Honor, there's a disagreement about the appropriate measuring period, the CVR agreement under 7.6 does not entitle the auditor to make the determination as to who's right about what that appropriate measuring period is. That's an issue that is going to be decided in this litigation.

THE COURT: But we don't have to have the accountant decide that, do we though, if we just take the --

MR. NEUWIRTH: We don't, the answer is we don't, Your Honor, if we think it would be efficient to audit the larger period.

THE COURT: How much work is involved in auditing an extra year's worth of data versus what would otherwise

be done?

MR. NEUWIRTH: Again, I think it's hard to guess about that, I'm not the auditor, it will depend upon the information sought. If this litigation is any guide, it could be an enormous amount of work for the auditor to do that. And we just think that makes no sense when the same issues are at issue in this underlying litigation.

THE COURT: What burden is placed upon your client if the audit is done?

MR. NEUWIRTH: Same kind of burden that's placed upon my client in this litigation, producing documents requested by an independent auditor, presumably, and cost. Obviously we're spending an enormous amount of money in connection with discovery in this litigation and we'll be spending more in connection with this audit if it were to happen.

THE COURT: Isn't the audit going to have to be done at some point, even for the litigation?

MR. NEUWIRTH: Well, an audit, per se, no, the issue in this litigation is whether we utilize diligent efforts towards the approval milestone, and towards the sales milestones, and towards the production milestone.

THE COURT: But isn't plaintiff going to compile something that's going to be damages claimed that is partly

going to depend on what those numbers were or should have been?

MR. NEUWIRTH: Oh, I don't think plaintiff has a claim in this litigation right now, that suggests that the milestones were, in fact, met. So that's not a claim in this litigation.

THE COURT: Well no, but it's the shortfall issue, right, it's, again, the idea that it wasn't met.

MR. NEUWIRTH: There's a second issue, Your Honor, on top of the inefficiency and the fact that we are essentially doing that in this litigation at the same time that they want this audit. The second issue is, it's premature under Federal Rule of Civil Procedure 56(D). We do have affirmative defenses, Your Honor, to this claim, and to the other claims in general. The affirmative defense that's directly relevant here is the defense that this particular request for the audit is being exercised in violation of plaintiff's duty of acting in good faith.

The reason why we made that claim is not to impugn the Cahill firm, by any stretch of the imagination, but because of the reality that the way that this request arose. And that requires a little bit of history in connection with this litigation which predates Your Honor, and let me just spend one minute on it.

THE COURT: Sure.

MR. NEUWIRTH: This litigation existed and the plaintiff was, beginning at the end of 2015/beginning or 2016, plaintiff was a different trustee, not UMB but a trustee called American Stock Transfer and Trust Company. AST, I'll refer to that plaintiff as.

THE COURT: Okay.

MR. NEUWIRTH: AST resigned as trustee, Your Honor, in May of 2016. AST, prior to its resignation, was represented by different counsel, Milbank Tweed. After AST resigned, UMB became the successor trustee and Cahill became counsel to UMB or was counsel to UMB. Right after Cahill came into case, Your Honor, there were three extrajudicial requests made of Sanofi by letter demand. One was in the beginning of December, 2016, outside of the formal discovery process of the litigation for documents from Sanofi for the purpose of investigating the production milestone issues. That was at the beginning of 2016.

Then in the middle of 2016, Your Honor, again, outside of the formal discovery process of the litigation which was underway, plaintiff requested additional documents from Sanofi regarding Sanofi's commercial and developmental activities with respect to the drug at issue, with respect to Lemtrada. Then a third request came in,

Your Honor, on December 19th of 2016, and that was the audit request. All of these issues were duplicative of the underlying discovery that was already underway and duplicative of the claims that had already been asserted in the case, but for the production milestone claim.

We took the position in response to those three letters, Your Honor, that those requests were not proper and were not in good faith, and were designed to harass. We already had a litigation about these same issues --

THE COURT: But they might be able to find out in a different time period through asserting their direct contractual right what may take longer in litigation, right?

MR. NEUWIRTH: Right, but you can't assert a direct contractual right if you are not doing it in good faith. And that was the basis for the denial of the request. Plaintiffs then amended their complaint to add a claim for breach because of our denial of the request, that's where we asserted our affirmative defenses of bad faith. Plaintiff then added the production milestone claim into the case, it wasn't previously. On that second amended complaint we renewed those defenses and so that's where the affirmative defense comes from.

Yes, Your Honor, you could exercise contractual

rights, but you can't do so if you are not doing it in good faith. And we think the circumstances under which all of these extrajudicial requests were made when we were in the middle of litigating the very same issues, violated that contractual --

THE COURT: But why, why is it bad faith?

MR. NEUWIRTH: Well, Your Honor, I think it was harassment. I think it was harassing. We were already --

THE COURT: What was harassing about it? What, how does that manifest?

MR. NEUWIRTH: Well it manifests itself by repeated requests, you know, in the middle of a litigation that's already commenced where the underlying issues are already being litigated, and this is, in fact, duplicative of what's already happening.

THE COURT: So if that's it, then all that means is you're reading letters and responding to them perhaps. I'm trying to understand what else, you know, does it require more work, is there a certain burden that it imposes that otherwise isn't there, a certain cost?

MR. NEUWIRTH: You mean the actual audit, itself?

THE COURT: Yes. So making, these requests, if you honored them, what, or to put it differently, what could plaintiff be doing in bad faith to penalize you or

impose a burden on you? What is it that's bad faith? I mean it can't be bad faith just to assert a right and have to read a letter.

MR. NEUWIRTH: No, but it can be bad faith, and again, we would like take discovery into this issue, and I'll get to that point because that gets to the 56(D) point, but it can be bad faith if the purpose of exercising that right is to impose undue burden and cost.

THE COURT: So that's what I'm trying to figure out, what undue burden or cost is there from asserting their contractual right that's not already going to be dealt with in the litigation?

MR. NEUWIRTH: Well, because we're going to have to pay for an auditor. There's going to be internal time spent by internal Sanofi people to respond to what I'm sure will be significant demands from the auditor for information, and it may not be completely coextensive with the way the documents have already been produced. So that's certainly going to be cost. We are going to potentially have to manage that process, which is also going to be cost. So there's certainly time, expense and interruption of dealing with an audit, just like you would in any situation where you were dealing with an audit. That's the time and expense. I can't calculate it without having the

benefit of it actually happening but there's no question it's going to take time and it's going to take money.

THE COURT: If that auditor did his or her job and did all this, would that obviate the need for experts on either side regarding what would otherwise have to be done by an expert in the litigation?

MR. NEUWIRTH: I don't think so.

THE COURT: Why not?

MR. NEUWIRTH: Well I think there are going to be a lot of experts in this litigation but it's my sense that nothing that the auditor does will obviate the need for any of the various types of experts. But let me add one other, and plaintiff can speak to that, as well, I don't they are going to disagree, but let me move on on the 56(D) point.

Your Honor, as you will recall, we sought discovery from the CVR holders on a more general basis, not just relating to this particular audit request. Plaintiffs moved to quash those subpoenas, Your Honor granted that motion. We respectfully disagree with it, but that's what happened. So we are not getting discovery from the CVR holders, and the reason this is important is because under Section 7.6, which is the audit provision of the CVR agreement, the only way an audit can happen is if the CVR holders, called the acting holders, first request the

trustee to make that audit request.

Your Honor made that ruling, it was in a slightly different context in that our subpoenas were broader than just the summary judgment issue, but we have not been able to get discovery from the CVR holders which could provide us with evidence in support of our affirmative defenses. In other words, why did the holders decide to instruct the trustee to request this audit in the middle of an ongoing litigation that was essentially about the same stuff?

THE COURT: Are you going to get any other answer than to assert our contractual rights if you ask those questions? Really?

MR. NEUWIRTH: I don't know what the documents would have shown. Who knows what they would have shown? I have a document in my possession that says it's time to unleash Cahill. Now maybe that should be read in the best light and that just means we've got a new law firm and we're excited and let's go, but maybe there are other documents like that that mean something else. I don't know. I am not going to see the CVR holders' documents, at least right now. Your Honor has invited us to come back if we think it's appropriate and perhaps we will if we think it's appropriate. We also don't have discovery, at least of a deposition nature yet, because of the stage we're in in

depositions, of the plaintiff. And we're certainly going to take discovery of the plaintiff from a deposition perspective on a broad variety of issues including this one.

So for that reason, Your Honor, we think there are two bases upon which to deny this motion. One is a genuine issue of material fact that precludes it, and, two, it's too early. We need discovery still, it's not done.

THE COURT: Okay. For the plaintiff.

MR. GILMAN: Taking Mr. Neuwirth's argument in order, he is incorrect, the concept of shortfall does not appear anywhere in Section 7.6(A) of the CVR agreement.

THE COURT: I think there were other provisions, though, that were at issue.

MR. GILMAN: No, our motion is to enforce the right to have a nationally recognized firm examine books and records as necessary to verify the product sales statements and the numbers underlying therein. That's the words of the agreement. Our motion is restricted to 7.6(A), we're not seeking a 7.6(B) adjudication of a shortfall. The parties mentioned the existence of a possible shortfall, if an auditor, using all of there proffer were to say, even taking Sanofi at 100 percent of their words, there's a shortfall, well, we'd like to know that. But that's not why

they're going in there and that's not what they're being asked to do. This is a 7.6(A) and our brief to the Court says the instant motion is made with respect only to count four of the second amended complaint and the audit right under 7.6(A), period. So conflating 7.6(A) and 7.6(B) and saying there's a confusing issue and a factual dispute, that's a nonstarter. What we're talking about is exercising a mandatory right of inspection of books and records.

Second, the fact that there's litigation is truly not relevant because the parties bargained in section 8.8 of the CVR agreement, that all of the mandatory rights under that agreement exist whether or not a party is electing any remedies there under, whether or not there's a lawsuit, there's still an inspection right.

Your Honor's point about will this facilitate the case, perhaps obviate experts or otherwise, the answer is we believe so. Because what we're looking for here is the examination and the verification of the product sales numbers. What months are counted is a later determination. Picture a grid where you have quarters for timeframes and within quarters you have boxes for geographies, countries, major markets, other countries, whatnot. That grid is populated with numbers. We're asking to exercise a mandatory right to have an independent auditor verify the

numbers. How you move the template because of when was product launch or not, what countries count or not, how you move an Isinglass cover over that grid to figure out product sales, that's not what we're talking about. All we're talking about is verifying the numbers, that's the exercise. There's a contractual right to do it. If we do it, it's not going to have to be litigated at trial. People aren't going to have to put somebody on and say that conversion from that foreign currency to this currency was done in a way to manipulate the numbers, or was done truly and accurately.

We're not getting agreements on, we can't even get agreements that documents produced by them, by their client, with their Bates numbers, can be deemed to be authentic, leaving each counsel to have an exception to complain about business records if there is truly one that got in there by surprise. We can't get basic stipulations, so don't count on this trial being easy.

THE COURT: Oh, I'm not.

MR. GILMAN: And the bottom line is, if we have the auditors true up the numbers, verify the numbers, and again, these are their numbers, the contract is they offer money to buy Genzyme, the Genzyme board rejects it. They come back with a sweeter cash offer and this thing called a

CVR. Okay, there's now a contract. They have to every quarter produce a certified number, a grid with numbers certified by their CFO. All we're asking is to exercise the right to have an independent person say those numbers are right. Otherwise, the CVR agreement means nothing, it's illusory.

THE COURT: Let me stop you, I understand the argument. How, let me ask you about burden, what do you think will be required and what burden would this place on Sanofi?

MR. GILMAN: Well, whatever the burden is, it's one that was contractually agreed and one that they undertook, and that's the deal that was cut.

THE COURT: Okay, so assuming that for the moment --

MR. GILMAN: So whatever it is. It will only be what is necessary, this is not an audit in the sense of auditing Sanofi's financial statements, this is a verification of a sheet of paper, each quarter, the numbers on that sheet of paper.

THE COURT: Well there could be a lot behind those numbers.

MR. GILMAN: The numbers were -- well, assuming that they weren't divine, those numbers are built up. So

they have a pile of documents. So they give those, those documents are already assembled, they're whatever the affiant reviewed to verify what he produced or his underlings. So pulling the documents together for the independent auditor should not be an issue, they should already have --

THE COURT: But how deep does it go? What if the auditor says, you know what, there's something about these numbers from, let's go back to France, and say something isn't measuring up here, I actually want to go to the French arm of Sanofi and talk to them, and now I need to go talk to their accountants. How, is there a limit?

MR. GILMAN: Well under the contract, no. Because the contract says that the fees charged by such accounting firm shall be paid by Sanofi. That's the contract, that's the deal. We're not talking here about litigation expense being imposed. We're talking about the exercise of a contractual right of inspection.

THE COURT: Well we are talking about potential additional expense if it's something that's going to be done in the litigation anyway.

MR. GILMAN: And that could obviate a great deal of litigation expense. And what I'm suggesting, Your Honor, is if we could rely on the numbers, there would be less

discovery, there would be less depositions of their CFO, a shorter one. There would be less documents and --

THE COURT: Well there are documents already out there.

MR. GILMAN: Well, and that's another thing. He's talking pages, not documents.

THE COURT: I know, 900-and-something-thousand documents.

MR. GILMAN: And half of it is the filing with the FDA that wasn't done right.

THE COURT: They are, those are voluminous.

MR. GILMAN: Okay, so the first 10 million pages you can chalk off to we didn't do it right, and now we're producing whatever we're producing. But we're not looking for batch records, we're not looking for tonnage, the fact that they may produce tonnage, you know, we're suffering having to read a lot of irrelevant stuff.

THE COURT: Who directs and controls the auditor? Sanofi is paying for --

MR. GILMAN: By themselves, no, they're not controlled. It's an independent auditor.

THE COURT: Right.

MR. GILMAN: A month ago I proposed to Mr. Neuwirth, let's not talk about the two auditors that Sanofi

uses, Pricewaterhouse and Ernst & Young, let's not talk about the one auditor that the trustee uses, KPMG, BDO International, a firm of national reputation, international reputation, I said how's that, a month ago, and we don't have an answer because he won't talk about who the auditor could be until Your Honor rules, and presumably then he'll appeal. And he won't talk about it until after Judge Daniels rules. And what we're doing here is self helping ourselves out of a contractual obligation. Instead of stepping up and saying these are our numbers, we're perfectly comfortable with them, if you want to have an auditor come in, we've got all the stuff from which they were built, they can look at them, and if it goes sideways, if somebody says I want to go to France for the holidays, we can go back to you, they can come back to you.

THE COURT: Well can I set limits on the auditor? I guess I can.

MR. GILMAN: Or you can visit with the auditor in France, you know. But, Judge, the bottom line is, if we can get the numbers nailed down and we're entitled to nail them down, nothing has to be proven at trial.

THE COURT: Nothing?

MR. GILMAN: Of those numbers. Of those numbers.

THE COURT: Okay, so why not just, since there's

-- well --

MR. GILMAN: But if you try to prove those numbers at trial it's going to take a long time.

THE COURT: But so why not just do it in connection with the litigation? What benefit, what right is being, I don't know, addressed, other than that you have the right to do it? What is it doing for you that wouldn't otherwise get addressed in the course of the litigation?

MR. GILMAN: Well, for one, it doesn't get us an independent. Right now, the numbers, if an independent firm is selected and agreed between the two of us, fine, if not, we propose one, they propose one, and the two of them pick the middle, and the middle guy goes out and does it. If the numbers are verified by an independent party, they're taken as conclusive on the contractual parties --

THE COURT: Right, and that's why I asked before does it obviate experts who would otherwise have to do that?

MR. GILMAN: I think it might.

THE COURT: Well, that might, why wouldn't it? Why wouldn't it?

MR. GILMAN: Why wouldn't it?

THE COURT: Yeah, are either of you going to contest the independent auditor?

MR. GILMAN: It very well might, but the point is that --

THE COURT: Would you stipulate that if the independent auditor, whatever his or her findings are you're not going to challenge them?

MR. GILMAN: Won't challenge the numbers?

THE COURT: So why wouldn't that obviate something from litigation?

MR. GILMAN: I think it will, it will, number one, it will expedite things. Number two, it's a right. Number three, the parties agreed they would pay for the auditor. That's the contract. They can't keep taking back all the sections that say I will pay, it changes the deal.

THE COURT: Right. Well, they have their bad faith argument.

MR. GILMAN: Your Honor has already ruled that bad faith is not an element of contracts --

THE COURT: Well as I said that as a general principle.

MR. GILMAN: And, Your Honor, we've submitted the affidavit of Mr. Wilkinson from the trustee that he was acting at the direction of acting holders in exercising this contract right. What we've heard from Mr. Neuwirth today is he wants to know why. The exercise of a contract

right, is the exercise of a contract right. And if it will facilitate the litigation, if it will obviate additional litigation expenses, if it's mandatory and it's relevant, we're entitled to it.

THE COURT: Okay, actually you just prompted a question that I have for Mr. Neuwirth, which is traditionally, or at least in many situations, a bad faith claim to a contract claim, to a contract issue, is one where someone is impeding getting it done. Are you aware of any cases or case law that says that enforcement of a right under a contract can be bad faith?

MR. NEUWIRTH: Yes.

THE COURT: Okay.

MR. NEUWIRTH: And I believe we've cited them in our brief, Your Honor.

THE COURT: My apologies for not remembering.

MR. NEUWIRTH: You cannot enforce a contractual right if you are doing so in bad faith. We cited two cases in our brief, the *Richbell* case, 309 A.D. 2d 288 (1st Dept. 2003) and the *Dalton* case, 87 N.Y. 2d 384, that looks like it's New York -- it's the Court of Appeals.

THE COURT: What was the name of the first one?

MR. NEUWIRTH: *Richbell*, R-I-C-H-B-E-L-L, 309 A.D. 2d 288, 302 (1st Dept. 2003). The *Dalton* case is 87

N.Y. 2d 384, 389 (1995). That's the Court of Appeals, Your Honor, we cited both of those cases.

THE COURT: Okay.

MR. NEUWIRTH: Your Honor, let me just say one or two brief things, I think Your Honor probably has heard a lot.

THE COURT: Yes, and actually we do need to wrap up because I have another proceeding at four that I need to prepare for. So let's take five minutes.

MR. NEUWIRTH: Let me be done in even less. Back to the first point, plaintiff's counsel said that all they're asking for is to check the numbers. I refer the Court, respectfully, to plaintiff's actual motion which is document number 134.

THE COURT: I have that.

MR. NEUWIRTH: This is their notice of motion, page 2, prayer for relief, number 5, they want, the Court, an order --

THE COURT: You don't have to read it, there's --

MR. NEUWIRTH: I won't read it, but it's asking for the independent auditor to declare a CVR shortfall.

THE COURT: It is, and they have requested that, but it is a legitimate issue to address, see if they can be addressed separately. In other words, relief could be

granted in part, I'm denying it.

MR. NEUWIRTH: But the comment was made that that piece of relief was not being sought from this Court, it's being sought on page 2 of the actual motion.

THE COURT: Yes, I guess I will ask, given what was said here at argument, is that part of the relief being ceded and given up at this point?

MR. GILMAN: Your Honor, we'll restrict the motion to 7.6(A) which is the right of inspection and verification. Shortfall does not appear in 7.6(A), it appears in 7.6(B), we will not be seeking relief under 7.6(B) on this motion.

THE COURT: Right.

MR. NEUWIRTH: And, Your Honor, just to wrap up, if I could, again, the burden is real. We've talked about France, how about 70 other countries that are involved in this product and that's information that rolls up in the product sales statement. So again, the notion that this is some type of easy exercise is just not true. We know that from experience, we've been litigating this case, we know how much information there is.

THE COURT: Right, and I agree with plaintiff that burden doesn't get you out of a contractual obligation, but we have a context where there is a massive

litigation going on concerning similar or the same issues.

MR. NEUWIRTH: We have a context where there's a massive litigation going on and we have an affirmative defense which questions why this right is being invoked in that context for which we have not received discovery yet. Or certainly we're not complete.

THE COURT: In the cases that you cited, are those situations where the claims didn't have merit and they were asserting them?

MR. NEUWIRTH: No.

THE COURT: No.

MR. NEUWIRTH: In fact, we cited the Siemag NYMEX case, Your Honor, Southern District of New York 2012, that's Judge Daniels, he denied a summary judgment motion on these exact same grounds and held, and I quote, "fact discovery was necessary to determine whether any of the numerous affirmative defenses proffered by defendants precluded liability." They were at a very similar stage in the case as we are here, and that's our situation.

THE COURT: Did they include a bad faith defense?

MR. NEUWIRTH: I believe it did.

THE COURT: Okay. I think we're done unless I hear any more comment?

MR. GILMAN: Your Honor, unless this discovery is

provided in the lawsuit, it's not duplicative. You can't play this Three-card Monte where we're going to get it in the lawsuit so, therefore, you don't get it under an inspection right, and then not get it in the lawsuit.

THE COURT: Well data is being exchanged, I think it's just a question of who does it and who foots the expense and when it's done.

MR. GILMAN: Well a contract right that says that the CVR, acting CVR holders may request and inspection to verify the most important sheet in the case, these are the numbers that add up, if taken as true, to the sales which either do or do not meet milestones. It cannot be that Sanofi can say whatever numbers they want and no one is allowed to go behind them. The contract was prepared to give the CVR holders and absolutely mandatory right and one that Sanofi was going to pay for and they knew that going in, and if you knew that going in, every time you'd produce the sheet you'd have a pile of supporting documents and it's not going to cost you much to show it to an auditor.

THE COURT: Okay.

MR. GILMAN: And if that's not what they did, all the more reason that we should have an independent party verify these numbers.

THE COURT: Okay, I've heard enough, no one needs

the last word. I thank you very much for the issues we discussed today, anything else down the line, let me know. I think you have your instructions on the privilege and discovery issues and the Court will reserve judgment on the summary judgment motion.

MR. GILMAN: Thank you, Your Honor.

MR. NEUWIRTH: Thank you, Your Honor.

THE COURT: Thank you.

(Whereupon the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, UMB BANK v. SANOFI, Docket #15cv8725, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Date: April 4, 2018